

Notes on the EU, ECJ and anti-discrimination

You should be able to explain the concepts of:

- Direct and indirect discrimination
- Discrimination by association
- Shift of the burden of proof

EU anti-discrimination policy: one of the few in which the EU has a competence explicitly based on the primary law (arguably, this leads the CJ to more ambitious case law, because the EU can act in this field). As usual, the cases make it to the CJ typically through the preliminary ruling procedure, not through the infringement action.

Primary law

ToA brought the EU competence in anti-discrimination (in effect from 1999) – see TEC after ToA revision:

Without prejudice to the other provisions of this Treaty and within the limits of the powers conferred by it upon the Community, the Council, acting unanimously on a proposal from the Commission and after consulting the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.

Nowadays TFEU (consolidated version after ToL):

Article 19 (ex Article 13 TEC)

1. Without prejudice to the other provisions of the Treaties and within the limits of the powers conferred by them upon the Union, the Council, acting unanimously in accordance with a special legislative procedure and after obtaining the consent of the European Parliament, may take appropriate action to combat discrimination based on sex, racial or ethnic origin, religion or belief, disability, age or sexual orientation.
2. By way of derogation from paragraph 1, the European Parliament and the Council, acting in accordance with the ordinary legislative procedure, may adopt the basic principles of Union incentive measures, excluding any harmonisation of the laws and regulations of the Member States, to support action taken by the Member States in order to contribute to the achievement of the objectives referred to in paragraph 1.

Secondary law

EU Anti-discrimination measures

- Council Directive 2000/43/EC of 29 June 2000 implementing the principle of equal treatment between persons irrespective of racial or ethnic origin: also called the "**Race Directive**" (Directive 2000/43/EC on Anti-discrimination) *wide scope of protection, but only race and ethnic origin covered + duty of states to designate a body for promotion of equal treatment*

- Council Directive 2000/78/EC of 27 November 2000 establishing a general framework for equal treatment in employment and occupation *many discriminatory grounds (disability, sexual orientation, religion or belief and age), but only covers employment and occupation*
- Council Directive 2004/113/EC of 13 December 2004 implementing the principle of equal treatment between men and women in the access to and supply of goods and services *narrow both on discrimination grounds (men and women) and scope of protection (the access to and supply of goods and services)*
- Directive 2006/54/EC of the European Parliament and of the Council of 5 July 2006 on the implementation of the principle of equal opportunities and equal treatment of men and women in matters of employment and occupation (recast)

This is the list of the most important current measures, otherwise the anti-discrimination directives were adopted already in 1970s (the Equal Pay Directive of 1975 and the Equal Treatment Directive of 1976, which prohibited discrimination on grounds of gender in access to employment, vocational training and promotion, and working conditions).

CJ case law

From old case, you should know the Sabena case (see the Chalmers chapter + e.g.

[https://en.wikipedia.org/wiki/Defrenne_v_Sabena_\(No_2\)\)](https://en.wikipedia.org/wiki/Defrenne_v_Sabena_(No_2)))

From the more recent case-law not covered in the Chalmers chapter, I recommend to become familiar with:

- *Test Achat* (http://ec.europa.eu/dgs/legal_service/arrets/09c236_en.pdf)
- *Asociația ACCEPT* (<https://www.opensocietyfoundations.org/voices/case-watch-european-court-justice-faults-response-football-tycoons-anti-gay-remarks>)
- *CHEZ* (<https://www.opensocietyfoundations.org/press-releases/eu-court-finds-bulgarian-electricity-company-discriminated-against-roma>)
- *Kaltoft* (<http://europeanlawblog.eu/2015/04/09/case-c-35413-kaltoft-v-municipality-of-billund-can-obesity-be-a-disability-under-eu-equality-law/>)
- And of course *Coman* case + two cases you are dealing with in your Project 2

Links

There are plenty of materials on anti-discrimination at the EU FRA webpage:

<http://fra.europa.eu/en/publications-and-resources>, incl. a handbook

(<http://fra.europa.eu/en/publication/2018/handbook-european-law-non-discrimination>).

Top blogs on (constitutional/international/EU) Law periodically inform on the most interesting

European cases: Verfassungsblog (<https://verfassungsblog.de/>), European Law Blog

(<http://europeanlawblog.eu/>), EU Law Analysis (<http://eulawanalysis.blogspot.com/>), EJIL Talk

(<https://www.ejiltalk.org/>).

Some short interesting videos for your leisure time:

- Jane Elliot <https://www.youtube.com/watch?v=6JbGC1Ine6M> (“racism destroyed in one minute”) – quite a controversial personality

- <https://www.youtube.com/watch?v=9yC7-JsR2Fk> (Clinton – Trump debate raw)
- <https://www.youtube.com/watch?v=UY7Gf1LHhE> (Clinton – Trump debate mix)
- https://www.youtube.com/watch?v=v_Ebm-4PfyQ (an illustrative contribution to structural inequality)